

Proelss

United Nations
Convention on the
Law of the Sea

A Commentary

C.H.BECK · HART · NOMOS

United Nations Convention on the Law of the Sea

A Commentary

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Proelss

United Nations Convention
on the Law of the Sea

Foreword

The edition of this new Commentary on the United Nations Convention on the Law of the Sea is as timely as it will be welcome to both academics and practitioners working in the fields of the law of the sea and oceans governance. After more than 35 years since the adoption of the Convention, there is an urgent need for an updated evaluation of its provisions and of the practice that has emerged regarding its implementation.

The conclusion of the 1982 United Nations Convention on the Law of the Sea was a milestone achievement on the part of the international community of States. Their negotiations at the Third United Nations Conference on the Law of the Sea resulted in a regime for the governance of the oceans which was unprecedented in its scope and comprehensiveness. Quite rightly, the Convention is therefore being called a 'Constitution for the oceans'. Nevertheless, the Convention cannot and has never been intended to provide an answer to every issue arising in connection with the use of the oceans and their governance. In effect, it is a framework treaty which has proved to be a flexible instrument serving as a solid foundation for the further progressive development of a legal regime for the oceans.

The Convention is a 'living' instrument and is subject to an ongoing process of change and adaptation to new challenges. Such development is being achieved through negotiation of new instruments supplementing the regime established by the Convention as well as through interpretive implementation of the Convention. This has been demonstrated by the conclusion of two highly important implementing agreements, namely the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1992 and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. This process may well continue in the future, as evidenced by resolution 69/292 adopted by the General Assembly of the United Nations on 19 June 2015 and concerning the development of 'an internationally legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction'.

Progressive development of the legal regime established by the Convention is, however, not limited to the adoption of new legal instruments. It is also accomplished through interpretive implementation of the Convention. Such development may take the form of State practice developing a uniform approach to the implementation of specific provisions of the Convention acquiring general recognition. It may also be fostered by the practice of international institutions competent to administer parts of the Convention's regime and by the jurisprudence of international courts and tribunals entrusted under the Convention to settle disputes concerning its interpretation or implementation.

Over the years, the three institutions established by the Convention, namely the International Seabed Authority, the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf, through their activities and, in the case of the International Tribunal for the Law of the Sea, through its jurisprudence, have made a substantial contribution, within the areas of their competence, to the progressive development of the international regime established by the Convention. The role of international judicial bodies is of particular relevance with regard to the many provisions of the Convention which are the result of compromises found during negotiation and which, as a consequence, leave room for ambiguities and differences of understanding. Those provisions in particular require evolutionary interpretation and this role is performed, on many occasions, by international courts and tribunals when adjudicating individual contentious cases or when rendering advisory opinions.

Foreword

The wealth of developments which have occurred since the entry into force of the Convention and which have shaped the practice relating to its implementation require careful and in-depth analysis and evaluation. This is the task and challenge on which the new Commentary is focusing. It will thereby complement the already existing Commentary edited by the Center for Oceans Law and Policy of the University of Virginia. Both works will be relevant for academics and practitioners alike. The Virginia Commentary, with its focus on the legislative history of the Convention, will continue to provide insights into the development of the Convention's provisions while the new Commentary puts an emphasis on analysing each provision of the Convention and its Annexes, element by element. It will give particular consideration to the practice regarding the implementation of the Convention as developed by States and international organizations as well as to the jurisprudence of international courts and tribunals.

Thus, the new Commentary will serve all those who are called upon to contribute to the implementation and interpretation of the Convention and to ensure proper compliance with its provisions. It will also offer valuable information to those involved in ongoing or future negotiations on new instruments supplementing the Convention.

The preparation of the new Commentary is also welcomed because we need to ensure proper compliance with the provisions of the Convention in the light of new developments which, on the one hand, enhance our ability to use ocean resources but, on the other, require particular attention to be paid to the preservation and protection of the marine environment.

Let me therefore express my appreciation to the editors and contributors as well as to the publisher for their efforts in preparing and publishing this Commentary, which will establish itself as one of the standard works on the international law of the sea.

November 2016

Judge Vladimir Golitsyn
President of the International Tribunal for the Law of the Sea

Preface

When I first discussed the idea of launching a new commentary on the 1982 United Nations Convention on the Law of the Sea (UNCLOS) with participants of the Fourth J.H.W. Verzijl Memorial Symposium that took place at Utrecht University in November 2008, I had a general idea of the challenges that would come along with the process of editing such a volume, but certainly did not expect the project to take almost ten years. The reasons why it took such a long time for the book to finally become a reality are manifold. It is per se not a simple task to coordinate a scientific book project involving more than 60 authors from many different regions in the world. More importantly, the establishment of national research councils and the like, which require scientists and researchers to give account of their past activities on an annual basis, delays, or even endangers, every research project that, as is the case with Commentaries such as the present one, does not fall within the categories identified by these institutions as representing 'proper' research. It seems to me that the stereotyped approach on which these schemes are based ultimately results in compromising freedom of science rather than creating incentives for innovative research.

Notwithstanding these challenges, it is my sincere wish to use this opportunity to stress that it has been a privilege and pleasure to work together with such a distinguished group of legal practitioners, scholars and researchers in the context of the present book project. I am also indebted to the publishing houses C.H. Beck, Hart and Nomos, and in particular to Dr. *Wilhelm Warth*. As responsible person for the commentary series, Dr. Warth has been my main point of contact at C.H. Beck over all these years. He encouraged me to keep going with the project at times when I doubted that it would ever become a reality, and granted me all flexibility and support that an editor needs when conducting a research project of this magnitude. Together with *Thomas Klich*, he also kindly offered to compile the table of cases, the list of abbreviations and the index. Furthermore, I would like to cordially thank the German Research Foundation (Deutsche Forschungsgemeinschaft – DFG) for generously supporting the book project by way of a research grant. Last but not least, I owe a great debt of gratitude to my assistant editors. *Amber Maggio*, *Eike Blitza* and *Oliver Daum* (in order of degree of involvement) were, amongst many other issues, in charge of developing, adapting and applying the editorial guidelines, of communicating with the authors, but also of assisting me in safeguarding the scientific quality of the individual contributions to this Commentary. Without their input, perseverance and commitment, which went far beyond what can generally be expected from research associates that are additionally engaged in writing their PhD theses, this book would have not come into existence. They were supported at different stages of the project by a number of student researchers, namely *Felix Bode*, *Sara Cordes*, *Hannah Jentgens*, *Lara-Christin Meinert*, *Anika Natus* and *Martin Weiler*. *Killian O'Brien*, former research associate at the Walther-Schücking Institute for International Law at Kiel University, also deserves special mention for his assistance and input in the initial phase of the project prior to my move to Trier University.

The chapters written by the following authors solely reflect their private opinions and not the positions of the institutions for which they work: *Dorota Englender*, *Gwenaëlle Le Gurun*, *Doris König*, *Killian O'Brien*, *Daniel Owen*, *Kai Trümpler*, *Kishor Uprety* and *Ingo Winkelmann*.

The UNCLOS, which has convincingly been labelled the 'constitution for the oceans' (*Tommy T.B. Koh*), is the most comprehensive and certainly one of the most important and influential international treaties ever concluded. One of the central aims of this Commentary is to show that its terms offer much more than one would initially expect, and that it thus constitutes a living instrument (without denying the need to further develop the requirements codified therein) capable of addressing challenges that were not anticipated at the time

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of its negotiation and adoption. I sincerely hope that this book will prove to be a useful tool for both researchers and practitioners in accessing the Convention, understanding the meaning of its provisions, and applying it in a lawful manner in practice.

Trier, November 2016

Alexander Proelss

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Abbreviations

A

| | |
|-----------------|---|
| A&E | Ammunition and Explosives |
| ABE-LOS | Advisory Body of Experts on the Law of the Sea |
| ABNJ | Areas Beyond National Jurisdiction Program |
| AC | Appeal Cases |
| ACCOBAMS | Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area |
| ACP | African, Caribbean and Pacific |
| AFDI | Annuaire Français de Droit International |
| AIDCP | Agreement on the International Dolphin Conservation Program |
| AJEL | American Journal of Environmental Law |
| AJIL | American Journal of International Law |
| AnDrMer | Annuaire du Droit de la Mer |
| AnnIDI | Annuaire de l'Institut de Droit International |
| AoA | Agreement on Agriculture |
| Art. | Article |
| Asian JIL | Asian Journal of International Law |
| ASIL | American Society of International Law |
| ASR | Articles on the Responsibility of States for Internationally Wrongful Acts |
| ATBA | Area To Be Avoided |
| AVR | Archiv des Völkerrechts |
| AWPPA | Arctic Waters Pollution Prevention Act |
| AWZ | Ausschließliche Wirtschaftszone |

B

| | |
|--------------------------|--|
| BARCON | Barcelona Convention for the Protection of the Mediterranean Seas against Pollution |
| BAT | Best Available Technology |
| BBNJ Working Group | Ad Hoc Open-Ended Informal Working Group to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction |
| BDGVR | Berichte der Deutschen Gesellschaft für Völkerrecht |
| BEP | Best Environmental Practices |
| BfN | Bundesamt für Naturschutz |
| BOEMRE | Bureau of Ocean Energy Management, Regulation and Enforcement |
| BSFP | Boating Safety and Facilities Program |
| BWM | International Convention for the Control and Management of Ships' Ballast Water and Sediments |
| BYBIL | British Year Book of International Law |

C

| | |
|--------------|--|
| CBD | Convention on Biological Diversity |
| CCAMLR | Convention on the Conservation of Antarctic Marine Living Resources |
| CCAS | Convention for the Conservation of Arctic Seals |
| CCBSP | Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea |
| CCS | Carbon Capture and Storage |
| CCSBT | Commission for the Conservation of Southern Bluefin Tuna |
| CDEM | Construction, Design, Equipment and Manning |
| cf. | confer |
| CFC | Chlorofluorocarbon |
| Ch. | Chapter |
| CHS | Convention on the High Seas |
| CITES | Convention on International Trade in Endangered Species of Wild Flora and Fauna |
| CJEU | Court of Justice of the European Union |

Abbreviations

| | |
|------------------------------|---|
| CJICL | Cambridge Journal of International and Comparative Law |
| CLCS | Commission on the Limits of the Continental Shelf |
| CMATS Treaty | Treaty on Certain Maritime Arrangements in the Timor Sea |
| CMS | Convention on the Conservation of Migratory Species of Wild Animals |
| COLREGs | Convention on the International Regulations for Preventing Collisions at Sea |
| Colum J. Transnat'l L. | Columbia Journal of Transnational Law |
| COP | Conference of the Parties |
| CPD | Common Depth Point |
| CPUCH | Convention on the Protection of the Underwater Cultural Heritage |
| CSC | Convention on the Continental Shelf |
| CTS | Canada Treaty Series |
| CTSCZ | Convention on the Territorial Sea and the Contiguous Zone |
| CWILJ | California Western International Law Journal |
| CWRJIL | Case Western Reserve Journal of International Law |
| CYIL | Canadian Yearbook of International Law |
| D | |
| DOALOS | Division for Ocean Affairs and the Law of the Sea |
| Doc. | Document |
| Dods. | Dodson's Admiralty Report |
| E | |
| e. g. | exempli gratia (for example) |
| E.R. | All England Law Reports |
| EBSAs | Scientific Criteria for Identifying Ecologically and Biologically Significant Marine Areas in Need of Protection in Open-Ocean Waters and Deep Sea Habitats |
| EC | Electronic Chart/European Community |
| ECAFE | Economic Commission for Asia and the Far East |
| ECDIS | Electronic Chart Display and Information System |
| ECJ | European Court of Justice |
| ECOSOC | UN Economic and Social Council |
| ECR | European Court Reports |
| ECS | Extended Continental Shelf |
| ECtHR | European Court of Human Rights |
| ed./eds. | editor/editors |
| edn. | edition |
| EEZ | Exclusive Economic Zone |
| EFZ | Exclusive Fishing Zone |
| EIAs | Environmental Impact Assessments |
| EMSA | European Maritime Safety Agency |
| ENC | Electronic Navigational Chart |
| EnvtlPolyL | Environmental Policy and Law |
| et seq. | et sequentia (and that which follows) |
| EU | European Union |
| EUNAVFOR | European Union-led Naval Force |
| EurUP | Zeitschrift für Europäisches Umwelt- und Planungsrecht |
| F | |
| F.Supp. | Federal Supplement, 2nd Series – U.S. Federal Case |
| FAO | Food and Agricultural Organization of the United Nations |
| Florida JIL | Florida Journal of International Law |
| FOCP | Foreign Office Confidential Print |
| G | |
| GA | General Assembly |
| GA. J. Int'l & Comp. L. | Georgia Journal of International and Comparative Law |
| GAIRS | Generally Accepted International Rules and Standards |
| GAOR | UN General Assembly Official Records |
| GATT | General Agreement on Tariffs and Trade |
| GDS | Geographically Disadvantaged States |

| | |
|--------------|---|
| GEF | The Global Environment Facility |
| GESAMP | Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection |
| GFCM | General Fisheries Commission for the Mediterranean |
| GIELR | Georgetown International Environmental Law Review |
| GPA | Global Programme of Action |
| GYIL | German Yearbook of International Law |

H

| | |
|--------------|---|
| HELCOM | Baltic Marine Environment Protection Commission |
| HMS | Highly Migratory Species |
| HNS | Hazardous and Noxious Substances |
| HSSC | Harmonized System of Survey and Certification |
| HVDC | High Voltage Direct Current |

I

| | |
|----------------------|--|
| IAEA | International Atomic Energy Agency |
| IAG | International Association of Geodesy |
| IASS | Institute for Advanced Sustainable Studies |
| IATTC | Inter-American Tropical Tuna Commission |
| ibid. | ibidem (in that very place) |
| IBRU | International Boundaries Research Unit |
| ICAO | International Civil Aviation Organization |
| ICCAT | Inter-American Tropical Tuna Commission |
| ICCAT | International Commission for the Conservation of Atlantic Tunas |
| ICES | International Council for the Exploration of the Seas |
| ICJ | International Court of Justice |
| ICLQ | International Comparative Law Quarterly |
| ICLR | International and Comparative Law Review |
| ICNT | Informal Composite Negotiating Text |
| ICOA | International Coastal and Ocean Organization |
| ICRW | International Convention for the Regulation of Whaling |
| IDDRI | Institute for Sustainable Development and International Relations |
| IHB | International Hydrographic Bureau |
| IHO | International Hydrographic Organization |
| IJECL | International Journal of Estuarine and Coastal Law |
| IJMCL | International Journal of Marine and Coastal Law |
| ILA | International Law Association |
| ILC | International Law Commission |
| ILM | International Legal Materials |
| ILR | International Law Reports |
| IMCO | Intergovernmental Maritime Consultative Organization |
| IMLI | International Maritime Law Institute |
| IMO | International Maritime Organization |
| Int Crim L Rev | International Criminal Law Review |
| IOC | Intergovernmental Oceanographic Commission |
| IOLR | International Organizations Law Review |
| IOTC | Indian Ocean Tuna Commission |
| IPCC | Intergovernmental Panel on Climate Change |
| ISA | International Seabed Authority |
| ISBA | International Seabed Authority |
| ISNT | Informal Single Negotiating Text |
| ITLOS | International Tribunal for the Law of the Sea |
| ITU | International Telecommunication Union |
| IUCN | International Union for Conservation of Nature and Natural Resources |
| IUU | illegal, unreported and unregulated |
| IWC | International Whaling Commission |
| IWGP | Intergovernmental Working Group on Marine Pollution |

J

| | |
|--------------------------------|---|
| JARPA | Japan's Southern Ocean Whaling Program |
| J. Transnat'l L. & Pol'y | Journal of Transnational Law and Policy |

Abbreviations

| | |
|------------------------------------|---|
| JDI | Journal du Droit International |
| JIL | Journal of International Law |
| JMOA | Journal of Maritime and Ocean Affairs |
| JSpace L | Journal of Space Law |
| L | |
| LAT | Lowest Astronomical Tide |
| LDC | Least Developed Countries |
| LJIL | Leiden Journal of International Law |
| LL | Land-locked |
| LLGDS; LL/GDS | Land-locked and Geographically Disadvantaged States |
| Lloyd's Rep. | Lloyds Law Reports |
| LLS | Land-locked State |
| LN | League of Nations |
| LN Docs. | League of Nations Documents |
| LNTS | League of Nations Treaties Series |
| LOS [Convention] | United Nations Convention on the Law of the Sea |
| LOSB | Law of the Sea Bulletin |
| LOSIC | Law of the Sea Information Circular |
| LR | Law Review |
| LTE | Low-tide Elevation |
| M | |
| m | metre(s) |
| MARPOL | International Convention for the Prevention of Marine Pollution from Ships |
| MCA Convention | Convention in the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Convention (MCA Convention) |
| McGill Int'l J. Sust. Dev. & Pol'y | Mc Gill Journal on Sustainable Development and Policy |
| Melb.J.Int'l L. | Melbourne Journal of International Law |
| MFN | Most Favoured Nation |
| MN | Margin Number |
| MoU | Memorandum of Understanding |
| MPA | Marine Protected Area |
| MPEPIL | Max Planck Encyclopedia of Public International Law |
| MPYUNL | Max Planck Yearbook on United Nations Law |
| MSR | Marine Scientific Research |
| MSY | Maximum Sustainable Yield |
| N | |
| NAFO | Northwest Atlantic Fisheries Organization |
| NAMMCO | North Atlantic Marine Mammal Commission |
| NASCO | North Atlantic Salmon Conservation Organization |
| NEAFC | North-East Atlantic Fisheries Commission |
| NG | Negotiating Group |
| NGO | Non-governmental Organization |
| NIEO | New International Economic Order |
| NILR | Netherlands International Law Review |
| NM | Nautical Mile |
| NordÖR | Zeitschrift für öffentliches Recht in Norddeutschland |
| NORDREG | Northern Canada Vessel Traffic Services Zone Regulations |
| Notre Dame L.Rev. | Notre Dame Law Review |
| NPAFC | Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean |
| NPFC | North Pacific Fisheries Commission |
| NSCR | Netherlands Institute for the Study of Crime and Law Enforcement |
| NSHC | North Sea Hydrographic Commission |
| NuR | Natur und Recht |
| NYIL | Netherlands Yearbook of International Law |

| | |
|------------------------|--|
| NYUJILP | NYU Journal of International Law and Politics |
| NZJEL | New Zealand Journal of Environmental Law |
| O | |
| OCLJ | Ocean and Coastal Law Journal |
| OCT | Organization of Communication and Transit |
| ODAS | Ocean Data Acquisition Systems |
| ODIL | Ocean Development and International Law |
| OEG | Operational Experts Group |
| OILPOL | International Convention for the Prevention of Pollution of the Sea by Oil |
| OJ | Official Journal |
| OPPRC | Convention on Oil Pollution Preparedness, Response and Cooperation |
| OSPAR Convention | Convention for the Protection of the Marine Environment of the North-East Atlantic |
| OSY | Optimum Sustainable Yield |
| P | |
| PCA | Permanent Court of Arbitration |
| PCASP | Privately Contracted Armed Security Personnel |
| PCIJ | Permanent Court of International Justice |
| PD | Practice Directions concerning Civil Appeals in the Court of Appeal |
| PICES | North Pacific Marine Science Organisation |
| PLOS | Public Library of Science |
| POPs | Persistent Organic Pollutants |
| Prepcom | Preparatory Commission |
| PROFISH | World Bank Global Program on Fisheries |
| PSC | Port State Control |
| PSI | Proliferation Security Initiative |
| PSSA | Particularly Sensitive Sea Areas |
| R | |
| RabelsZ | Rabels Zeitschrift für ausländisches und internationales Privatrecht |
| RCADI | Recueil des Cours de l'Académie de Droit International de La Haye |
| RdC | Recueil des Cours de l'Académie de Droit International de La Haye |
| RECIEL | Review of European, Comparative & International Environmental Law |
| Res. | Resolution |
| RFMO | Regional Fisheries Management Organization |
| RGDIP | Revue Générale de Droit International Public |
| RIAA | Reports of International Arbitral Awards |
| RINA | Registro Italiano Navale |
| RMP | Revised Management Procedure |
| RMS | Revised Management Scheme |
| RSNT | Revised Single Negotiating Text |
| RSP | Regional Seas Programme |
| S | |
| s. | section |
| S.Ct. | Decisions of the US Supreme Court |
| San Diego LRev. | San Diego Law Review |
| SBSTTA | Subsidiary Body on Scientific, Technical and Technological Advice |
| SDC | Seabed Dispute Chambers |
| SEAFO | South-East Atlantic Fisheries Organisation |
| SENC | System Electronic Navigational Chart |
| Sess. | Session |
| SFS | Straddling Fish Stocks |
| SIMPLY | Scandinavian Institute's Maritime and Petroleum Law Yearbook |
| SIOFA | South Indian Ocean Fisheries Agreement |
| SIPRI | Stockholm International Peace Research Institute |
| SOLAS | International Convention for the Safety of Life at Sea 1974 |
| SPRFMO | South Pacific Regional Fisheries Management Organisation |